PD-0474-18
COURT OF CRIMINAL APPEALS
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No. PD-0474-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/16/2018
DEANA WILLIAMSON, CLERK

ADRIAN JEROME PARKER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Gregg County
No. 06-17-00167-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Adrian Parker.

* The trial judge was Hon. David Brabham, Presiding Judge, 188th District Court, 101 E. Methvin, Suite 408, Longview, Texas 75601.

* Counsel for Appellant at trial was Rick Berry, Berry & Berry, 111 West Austin Street, Marshall, Texas 75670.

* Counsel for Appellant on appeal was Hough-Lewis ("Lew") Dunn, 201 E. Methvin, Suite 102, Longview, Texas 75601.

* Counsel for the State at trial were Tanya Reed and Debbie Garrett, Assistant Criminal District Attorneys, Gregg County Criminal District Attorney's Office, 101 E. Methvin, Suite 333, Longview, Texas 75601.

* Counsel for the State before the court of appeals was John J. Roberts, Assistant Criminal District Attorney, Gregg County Criminal District Attorney's Office, 101 E. Methvin, Suite 333, Longview, Texas 75601.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals erred in holding possession with intent to deliver did not qualify as a predicate offense for engaging in organized criminal activity (EOCA). In context, "unlawful manufacture, delivery . . . of a controlled substance" is a reference to an offense by the same name, and it includes (as it always has) possession with intent to deliver. That interpretation is consistent with a plain reading of the statute as a whole and how the Legislature would have understood it at the time EOCA was created.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

STATEMENT OF THE CASE

Appellant pled guilty without a plea bargain to four counts, including one count of EOCA alleging possession of a controlled substance with intent to deliver as the predicate offense. CR at 111. On appeal, Appellant challenged his conviction for EOCA on the ground that possession with intent to deliver is not a predicate offense for EOCA. The court of appeals agreed, acquitted Appellant of that offense, and further held that the conviction was not susceptible to reformation under *Thornton v. State*, 425 S.W.3d 289 (Tex. Crim. App. 2014).[1] This Court granted the State's petition for discretionary review on June 20, 2018.

GROUNDS GRANTED FOR REVIEW

1. Is "possession with intent to deliver" a predicate offense for engaging in organized criminal activity because it falls within "unlawful manufacture, delivery . . . of a controlled substance," which is one of EOCA's enumerated predicate offenses?

2. Can an EOCA conviction predicated on an offense that is not a predicate be reformed to that necessarily subsumed offense?

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[1] *Parker v. State*, No. 06-17-00167-CR, 2018 WL 1733969, at *4 & n.8 (Tex. App.—Texarkana Apr. 11, 2018) (not designated for publication).

STATEMENT OF FACTS

A confidential informant told police that Appellant was dealing cocaine from a duplex on Hoskins Street in Longview. SX 1; 5 RR 37; 6 RR 6-7, 13. Police surveillance confirmed the duplex had frequent, pop-in visitors. 6 RR 13. Police executed a search warrant a few days later (on January 6, 2015) and discovered baggies of cocaine in several places, including next to a prescription pill bottle in Appellant's name. 5 RR 40, 44; 6 RR 10, 16. Combined, the cocaine weighed almost 80 grams. 5 RR 86. Appellant was not present, but Christopher Crosby was and told police that Appellant and Ladelsha "La La" Price rented the duplex and the two other men there sold drugs for them. 6 RR 10, 14, 24. The owner confirmed that Price had rented the duplex. 5 RR 47-52; 6 RR 18, 21-22. Police left the warrant and inventory locked inside the duplex. 5 RR 66-67; 6 RR 21, 33. The next day, Appellant was stopped for a traffic violation and had these documents in his vehicle. *Id*.

During April and the beginning of May, the police and an informant conducted videotaped, controlled buys of cocaine from Appellant. Appellant first delivered 1.69 grams of cocaine at a house on West Nelson Street. 6 RR 61-64. The utilities there were in Price's name. 6 RR 68, 78. Appellant arranged a sale there two days later. 5 RR 72-73; 6 RR 70-73. Later in the month, Appellant sold the cocaine

himself, and Price was with him. 5 RR 73; 6 RR 76. He sold 2.9 grams of cocaine the following week from a house on Alpine Road. 5 RR 75, 86.

On May 11, police executed a search warrant at the Alpine Road house and found over 16 grams of cocaine, marijuana, and more than $3,000 in cash. 5 RR 77; 6 RR 96-97, 109 (lab report). Price was there alone. 5 RR 78. There was mail in Appellant's name, photographs of Appellant, his wallet, and a wallet belonging to Keithon "Kilo" Garland. 5 RR 83; 6 RR 102-04. The largest amount of cocaine was found in the room containing Appellant's wallet. 6 RR 103-04.

On June 23, Appellant was arrested for driving without a license and officers found marijuana and 1.62 grams of cocaine, part of which Appellant had tossed under the car. 5 RR 92; 6 RR 207, 209, 211.

Appellant was indicted for: (1) EOCA on January 6, 2015 (the date the first search warrant was executed) by conspiring with Price and Crosby to commit possession with intent to deliver between four and 200 grams of a controlled substance; (2) Possessing between four and 200 grams of cocaine with intent to deliver on May 11 (the second search warrant date); (3) Tampering with Evidence on June 23, 2015 (his arrest date); and (4) Possessing, that same day, between one and four grams of cocaine with intent to deliver. CR 5. He pleaded guilty without an

agreement to each count, judicially confessed that he was guilty of the alleged offenses and "all lesser offenses," and pled true to a prior-felony enhancement. CR 111; 5 RR 8-9, 18. He was convicted of all four offenses and sentenced to 45 years for the EOCA and possession counts. CR 138; 5 RR 175.

SUMMARY OF THE ARGUMENT

EOCA criminalizes the commission or conspiracy to commit an enumerated predicate offense with the intent to create or participate in a crime ring. TEX. PENAL CODE § 71.02; *O'Brien v. State*, 544 S.W.3d 376, 379 (Tex. Crim. App. 2018). "Possession with intent to deliver" is not specifically named on the list of qualifying predicate offenses in Penal Code § 71.02, but because it is a statutory manner and means[2] of committing the various "Manufacture or Delivery of Substance" offenses,[3] it should qualify under the enumerated predicate offense of "unlawful

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[2] *Weinn v. State*, 326 S.W.3d 189, 194 (Tex. Crim. App. 2010); *Lopez v. State*, 108 S.W.3d 293, 297 (Tex. Crim. App. 2003) ("[T]here are at least five ways to commit an offense [of Manufacture or Delivery] under Section 481.112," including possession with intent to deliver).

[3] *See* TEX. HEALTH & SAFETY CODE §§ 481.112 (penalty group 1 substances), 481.1121 (penalty group 1-A); 481.113 (penalty group 2 or 2-A); 481.114 (penalty group 3 or 4); 481.119 (miscellaneous substances).

manufacture, delivery . . . of a controlled substance." TEX. PENAL CODE § 71.02(a)(5). As argued below, that interpretation is consistent with the meaning that phrase had when EOCA was enacted.

Even if possession with intent to deliver is not a predicate, reforming the conviction to that offense is proper; it was necessarily included within the indictment allegations and fully supported by Appellant's plea and judicial confession.

ARGUMENT

ISSUE 1
(Status as a Predicate)

Question presented

Is "possession with intent to deliver" a predicate offense for engaging in organized criminal activity because it falls within "unlawful manufacture, delivery . . . of a controlled substance," which is one of EOCA's enumerated predicate offenses?

The current EOCA statute

In its present form, § 71.02 lists the following predicate offenses:

(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, continuous sexual abuse of young child or children, solicitation of a minor, forgery, deadly conduct, assault punishable as a Class A misdemeanor, burglary of a motor vehicle, or unauthorized use of a motor vehicle;

(2) any gambling offense punishable as a Class A misdemeanor;

(3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;

(4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons;

(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception;

(5-a) causing the unlawful delivery, dispensation, or distribution of a controlled substance or dangerous drug in violation of Subtitle B, Title 3, Occupations Code;

(6) any unlawful wholesale promotion or possession of any obscene

material or obscene device with the intent to wholesale promote the same;

(7) any offense under Subchapter B, Chapter 43, depicting or involving conduct by or directed toward a child younger than 18 years of age;

(8) any felony offense under Chapter 32;

(9) any offense under Chapter 36;

(10) any offense under Chapter 34, 35, or 35A;

(11) any offense under Section 37.11(a);

(12) any offense under Chapter 20A;

(13) any offense under Section 37.10;

(14) any offense under Section 38.06, 38.07, 38.09, or 38.11;

(15) any offense under Section 42.10;

(16) any offense under Section 46.06(a)(1) or 46.14;

(17) any offense under Section 20.05 or 20.06; or

(18) any offense classified as a felony under the Tax Code.

TEX. PENAL CODE § 71.02(a) (emphasis added to highlight subsection at issue).

The court of appeals' holding

The court of appeals held that § 71.02's only mention of drug possession requires "possession through forgery, fraud, misrepresentation, or deception" and that since possession with intent to deliver does not include any of these fraudulent

elements, it cannot qualify as a predicate offense.[4] *Parker*, 2018 WL 1733969, at *3. It relied on its earlier decision in *State v. Foster* and cited two other courts of appeals decisions. *Id*. (citing *Foster,* No. 06-13-00190-CR, 2014 WL 2466145, at *2 (Tex. App.—Texarkana June 2, 2014, pet. ref'd) (not designated for publication); *Hughitt v. State,* 539 S.W.3d 531, 536-37 (Tex. App.—Eastland 2018, pet. granted); *Walker v. State*, No. 07-16-00245-CR, 2017 WL 1292006, at *2 (Tex. App.—Amarillo, Mar. 30, 2017, pet. granted on another ground[5]) (not designated for publication)). The court of appeals should have considered whether possession with intent to deliver, as a statutory manner and means of the various "Manufacture or Delivery" offenses,[6] fell within the predicate offense of "unlawful manufacture,

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[4] In its court of appeals' brief, the State did not dispute that "[t]echnically" possession with intent to deliver was not a proper predicate offense. State's Brief at 5, No. 06-17-00167-CR.

[5] The State Prosecuting Attorney's granted issue (and brief) in *Walker*, PD-0399-17, assumes that possession with intent to deliver is not a predicate offense of EOCA: "Can a conviction for a charged, but nonexistent, offense be reformed to a subsumed and proven offense that does exist?" After the SPA filed its petition in *Walker,* other convictions for EOCA with possession with intent to deliver as the predicate offense—including this one—emerged in the appellate courts, and the SPA challenged the issue it earlier assumed to be true.

[6] *Weinn*, 326 S.W.3d at 194; *Lopez,* 108 S.W.3d at 297.

delivery . . . of a controlled substance" in § 71.02(a)(5). Interpreting this latter phrase as a reference to the statutory section heading for "Manufacture or Delivery" is consistent with how many other predicate offenses are named in § 71.02(a). Most of the § 71.02(a)(1) offenses[7] and all of the (a)(3) offenses,[8] for example, are statutory section headings and thus incorporate all manners and means within those headings.

Having said that, not all of § 71.02(a) are references to statutory section headings. Offenses are sometimes referred to narrowly, like the reference to only Class A assaults or the particular weapons offense in § 46.06(a)(1). *See* TEX. PENAL CODE § 71.02(a)(1) & (16). In this context, it is possible to read the phrase "manufacture or delivery" as a limitation to only those particular manner and means. That the Legislature, even in its original enactment, included some possession offenses in 71.02(a)(5)—those committed "through forgery, fraud,

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[7] *See, e.g.*, TEX. PENAL CODE § 71.02(a)(1) (listing, *e.g.*, murder, capital murder, arson). The exceptions are a few wording differences—"solicitation of a minor" instead of TEX. PENAL CODE § 15.031's "*Criminal* solicitation of a minor"; "unauthorized use of a *motor* vehicle" and "burglary of a *motor* vehicle" instead of Penal Code § 31.07's "unauthorized use of a vehicle" and § 30.04's "burglary of vehicles"—and the inclusion of only "Class A" assaults (§ 22.01(a)(1)).

[8] TEX. PENAL CODE §§ 43.03 (promotion of prostitution), 43.04 (aggravated promotion of prostitution), and 43.05 (compelling prostitution).

misrepresentation, or deception"[9]—also supports a more restrictive interpretation of the phrase. But, as shown below, that is not in keeping with how the Legislature would have understood "unlawful manufacture or delivery" at the time EOCA was enacted.

Plain meaning at the time of passage requires a broader reading

In interpreting a statute, courts focus on the statute's literal text "to discern the fair, objective meaning of that text *at the time of its enactment*." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (emphasis added). The phrase "unlawful manufacture or delivery . . . of a controlled substance" must be interpreted as it would have been understood at the time.

When EOCA was created in 1977,[10] there was a single, comprehensive offense in the Controlled Substances Act with the section heading "Unlawful Manufacture or Delivery of Controlled Substances."[11] This was Section 4.03. It

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[9] *Id*. § 71.02(a)(5).

[10] Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922 (S.B. 151) (eff. June 10, 1977), attached as Appendix A.

[11] Act of 1973, 63rd Leg., R.S., ch. 429, § 4.03, 1973 Tex. Gen. Laws 1132, 1153 (H.B. 447) (eff. Aug. 27, 1973) (originally TEX. REV. CIV. STAT. art. 4476-15 § 4.03),

provided that "a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1, 2, 3, or 4."[12] Later, it was split by penalty group into multiple statutory sections.[13] Then these were codified in the Health and Safety Code as part of a non-substantive revision, at which point the offenses lost the word "unlawful" from their headings.[14] In each version, however,

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attached as Appendix B.

[12] *Id*.

[13] Act of 1981, 67th Leg., R.S., ch. 268 (H.B. 730), 1981 Tex. Gen. Laws 696, 698-99 (eff. Sept. 1, 1981) (amending TEX. REV. CIV. STAT. art. 4476-15, § 4.03 to include only penalty group one substances and retitling it "Unlawful Manufacture or Delivery of Controlled Substance in Penalty Group 1" and adding §§ 4.031 "Unlawful Manufacture or Delivery of Controlled Substance in Penalty Group 2" and 4.032 "Unlawful Manufacture or Delivery of Controlled Substance in Penalty Group 3 or 4."). It splintered again when LSD (originally in penalty group 1) was moved to its own penalty group (1-A), which resulted in a new "Manufacture or Delivery" statute, still derived from § 4.03 "Unlawful Manufacture or Delivery of Controlled Substances." Act of 1997, 75th Leg., R.S., ch. 745, § 26 (H.B. 1070), 1997 Tex. Gen. Laws 2411, 2446 (eff. Jan. 1, 1998) (adding TEX. HEALTH & SAFETY CODE § 481.1121). Manufacture or Delivery of a Substance Not in a Penalty Group (now TEX. HEALTH & SAFETY CODE § 481.119) was added to the Controlled Substances Act in 1985. Act of 1985, 69th Leg., R.S. (S.B. 639), 1985 Tex. Gen. Laws 1102, 1122 (eff. Sept. 1, 1985) (adding TEX. REV. CIV. STAT. art. 4476-15 § 4.044).

[14] Act of 1989, 71st Leg., R.S., ch. 678, § 1 (H.B. 2136) (eff. Sept. 1, 1989) (codifying § 4.03 as TEX. HEALTH & SAFETY CODE § 481.112, § 4.031 as TEX. HEALTH &

possession with intent to deliver was included within the offense of "Manufacture or Delivery."

Consistent interpretation with the remainder of the statute

Interpreting "unlawful manufacture, delivery . . . of a controlled substance" as a reference to Controlled Substances Act § 4.03 (and what eventually became TEX. HEALTH & SAFETY CODE § 481.112, 481.1121, 481.113 & 481.114) is consistent with how the Legislature referred to most of the other predicate offenses at the time. In the five subsections included in the original legislation, most of the predicate offenses are listed by statutory section heading:[15]

> (1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, or forgery;
> (2) any felony gambling offense;
> (3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
> (4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons; or

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SAFETY CODE § 481.113, § 4.032 as TEX. HEALTH & SAFETY CODE § 418.114, and § 4.044 as TEX. HEALTH & SAFETY CODE § 481.119).

[15] While the "heading of a . . . section does not limit or expand the meaning of a statute," TEX. GOV'T CODE § 311.024, the legislature sometimes uses headings as cross-references to other statutes. *See, e.g.,* TEX. PENAL CODE § 30.02 (defining burglary to include entering a habitation with intent to commit "theft or an assault").

(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception.

Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922 (S.B. 151) (eff. June 10, 1977), attached as Appendix A.

All the offenses in original § 71.02(a)(1) and (3) are statutory section headings. Subsection (2)—felony gambling offenses—is even broader. It refers to the qualifying offenses by the chapter heading "Gambling" and includes all felonies within the chapter.[16] *See* TEX. PENAL CODE § 47.03 (gambling promotion); § 47.04 (keeping a gambling place); § 47.05 (communicating gambling information); § 47.06 (possession of gambling device or equipment).

Subsection (a)(4), most naturally, is a reference to the elements of what was then Penal Code § 46.06 (now § 46.05). Act of 1973, 63rd Leg., ch. 399, § 1 (S.B. 34), 1973 Tex. Gen. Laws 883, 964 (eff. Jan. 1, 1974). That section makes it an offense if a person "intentionally or knowingly possesses, manufactures, transports, repairs, or sells [particular prohibited weapons]." *Id*. As that section was (and is)

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[16] They have now been downgraded to Class A misdemeanors.

entitled "Prohibited Weapons," and the statute did not refer to that heading, there is no similar argument that subsection (a)(4) refers to the entire statutory section, including mere possession.

Subsection (a)(5), at issue here, is an amalgamation.[17] There appear to be no other section headings besides "Unlawful manufacture or delivery of controlled substances" in the rest of the subsection. Instead, it appears to be an attempt to include similar offenses in both the Controlled Substances Act and the Dangerous Drugs Act, even though the latter does not organize offenses around headings in a way similar to the Penal Code.

The first clause,

> unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug,

refers to four acts (manufacture, delivery, dispensation, and distribution) and two different substances (controlled substances and dangerous drugs). As mentioned above, the first reference—"unlawful manufacture, delivery . . . of a controlled

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[17] This Court need not definitively interpret the meaning of all the references to offenses in subsection (5) since only the phrase "unlawful manufacture, delivery . . . of a controlled substance" is at issue in this case. Nonetheless, that language must be considered in context.

substance"—tracks the section heading in the Controlled Substances Act. The Dangerous Drug Act also criminalizes manufacture or delivery of a dangerous drug in violation of the Act (such as delivery other than by a pharmacist in a properly labeled prescription bottle), but there is no separate heading in the Dangerous Drug Act to track. Act of 1973, 63rd Leg., R.S., ch. 429, § 6.03(c) (H.B. 447), 1973 Tex. Gen. Laws 1132, 1167-68 (eff. Aug. 27, 1973) (former Article 4476-14, § 3 & § 15(b) & (d)). Only controlled substances can be unlawfully "dispensed" or "distributed"; the Dangerous Drug Act does not contain these words. Consequently, the phrase "dispensation, or distribution" applies only to controlled substances and appears to be a reference to TEX. HEALTH & SAFETY CODE § 481.128(a) (former Controlled Substances Act § 4.08(a), entitled "Commercial offenses"), which makes it unlawful for a practitioner to distribute or dispense a controlled substance for various reasons (such as without a prescription or valid medical purpose).[18] It seems clear through the repeated references to dangerous drugs in this subsection that analogous offenses in the Dangerous Drug Act were meant to be eligible for the

[18] Act of 1973, 63rd Leg., R.S., ch. 429, §§ 3.08 & 4.08 (H.B. 447), 1973 Tex. Gen. Laws 1132, 1147, 1155 (eff. Aug. 27, 1973) (originally at TEX. REV. CIV. STAT. art. 4476-15 §§ 3.08 & 4.08).

organized crime enhancement.

> The second clause,
>
> > unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception[,]

involves the act of possession, the same two substances, and four manners and means (forgery, fraud, misrepresentation, and deception). The most obvious source for this language is TEX. HEALTH & SAFETY CODE § 481.129(a)(5) (former § 4.09(a)(3)), which prohibits possession of a controlled substance "by misrepresentation, fraud, forgery, deception, or subterfuge."[19] Other than listing the types of fraud in a different order, the only difference in the Controlled Substance Act violation and the reference in Subsection (a)(5) is that "subterfuge" is omitted from Subsection (5). Given the similarity between "deception" and "subterfuge," it seems unlikely that this omission is an intentional limitation to only certain forms of § 4.09(a)(3). Indeed, like the rest of Subsection (a)(5), the language may have been altered slightly to broaden the reach of the statute, particularly to accommodate similar (but not identical) offenses applicable to dangerous drugs. In this case, it appears to invoke

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[19] *Id*. at TEX. REV. CIV. STAT. art. 4476-15 § 4.09 (codified at TEX. HEALTH & SAFETY CODE § 481.129(a)(5)).

Section 14 of the Dangerous Drugs Act, which made it a violation of the Act to "obtain[ ] any dangerous drug" by "forged, fictitious, or altered prescription" or "by means of fictitious or fraudulent telephone calls" or to have "in his possession any dangerous drug secured by such forged, fictitious, or altered prescription or through the means of a fictitious or fraudulent telephone call . . . " Act of 1959, 56th Leg., R.S., ch. 425 (H.B. 556), 1959 Tex. Gen. Laws 923, 927 (eff. Aug. 10, 1959).

Undoubtedly, determining which offenses in the remainder of Subsection (5) are predicate offenses is no easy task. But the phrase "unlawful, manufacture . . . of a controlled substance" should be interpreted as a broader reference to that entire statute because of (1) the identical language in the original heading for "Manufacture or Delivery . . . "; (2) the predominate use of headings in the original scheme for § 71.02(a) to refer to entire statutory offenses; and (3) the attempt in this subsection toward the inclusion of more, rather than fewer, analogous offenses.

This analysis does not go beyond a strict textualist, "plain language" interpretation

It is unnecessary to declare the statute ambiguous before noticing that the language in the first part of § 71.02(a)(5) is a reference to the historical name for an

offense.[20] This is because a plain language interpretation necessarily involves looking at the language as the Legislature would have understood it at the time of passage. In 1981, closer to the time EOCA was enacted, this Court on original submission in *Nichols v. State*, explained:

> We think it obvious that the references of Sec. 71.02(a)(5) to 'unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception' are necessarily references to those offenses as defined in the Controlled Substances Act and the Dangerous Drugs Act.

653 S.W.2d 768, 771 (Tex. Crim. App. 1981) (op. on original submission). Indeed, at the time, the words "unlawful manufacture, delivery" would have been understood as an obvious reference to the Controlled Substances offense of the same name.

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[20] The issue of what tools and materials can properly be used to aid in statutory construction in absence of an ambiguity is currently pending in this Court. *Terri Lang v. State*, PD-0563-17 (submitted Feb. 28, 2018) (pitting TEX. GOV'T CODE § 311.023 against *Boykin*, 818 S.W.2d 782)). But this Court has also recently reiterated that only in the case of ambiguity or absurd results can a court consider extratextual factors like (1) the object sought to be attained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency provision. *Oliva v. State*, No. PD-0398-17, 2018 WL 2329299, at *2 (Tex. Crim. App. May 23, 2018).

Moreover, the Legislature has consistently equated Possession with Intent to Deliver with the "Manufacture or Delivery" offenses. This is for good reason. As this Court recognized, "manufacturing, possessing with intent to deliver, and delivering were all points along the spectrum of the offense of drug trafficking." *Weinn*, 326 S.W.3d at 194 (citing *Lopez*, 108 S.W.3d at 299-300). It would make little sense to start treating the offenses differently for purposes of EOCA. It makes even less sense when § 71.023, Directing the Activities of Criminal Street Gangs, is considered. That offense references its own predicate offense for manufacture or delivery by section number—TEX. HEALTH & SAFETY CODE § 481.112(e), (f). TEX. PENAL CODE § 71.023(a)(1). In so doing, it necessarily includes possession with intent to deliver. While it is not inconceivable that the Legislature might want to exempt possession with intent to deliver from EOCA enhancement for gang members but include it for gang leaders, it presumably would have done so in a less oblique manner. Instead, the references to "unlawful manufacture, delivery" in EOCA and § 481.112 in Directing the Activities of Criminal Street Gangs should be interpreted consistently.

Conclusion

The EOCA indictment in this case properly charged possession with intent to deliver as a predicate offense.

ISSUE 2
(Reformation)

Question presented

> Can an EOCA conviction predicated on an offense that is not a predicate be reformed to that necessarily subsumed offense?

***Reformation under* Thornton**

Even if possession with intent to deliver is not a predicate offense for EOCA, the court of appeals should have reformed the conviction to conspiracy to possess a penalty group 1 controlled substance with intent to deliver.[21] Under *Thornton v. State*, if the evidence is sufficient to support every element of a lesser-included offense and the factfinder necessarily found every such element in its conviction for the greater, a court of appeals is required to reform the verdict to show a conviction

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[21] The indictment alleged EOCA by conspiring to commit "Possession of a Controlled Substance in an Amount of Four Grams or More but Less than 200 Grams with Intent to Deliver." CR 5. Although the EOCA count did not specify the controlled substance, only penalty group one substances are categorized by degree of offense based on the increment of four grams or more but less than 200 grams. *See* TEX. HEALTH & SAFETY CODE § 481.112(d). While possibly susceptible to being quashed, an indictment that fails to name a particular controlled substance within penalty group one does not give rise to a valid "no evidence" claim. *See Ex parte Broussard*, 517 S.W.3d 814, 825 (Tex. Crim. App. 2017) (Newell, J., concurring to denial of reh'g).

for the lesser. 425 S.W.3d at 300 & n.55; *see also* TEX. R. APP. P. 43.6 (permitting the court of appeals to enter "any other appropriate order that the law and the nature of the case require.").

A number of potential circumstances might prevent reformation. This could include problems with the charging instrument, a question about whether the potential reformed offense is actually a lesser, and the context in which the error occurred. As explained below, none of these prevent reformation in this case.

The court of appeals erred in finding indictment error prevented reformation

The court of appeals held that reformation was not possible, citing the definition of a lesser-included offense in Article 37.09(1)—which makes an offense a lesser-included if it is "established by proof of the same or less than all the facts required to establish the commission of the offense charged." TEX. CODE CRIM. PROC. art. 37.09(1). The court of appeals reasoned that this definition requires there first to be an offense charged before there can be a lesser-included. It then held that because the EOCA count failed to charge an offense, there could be no lesser. *Parker*, 2018 WL 1733969, at *4 n.8.

The court of appeals was right that a true failure to charge an offense (or something of like magnitude) would render reformation impossible. *Lee v. State*

lends some support for this—although the propriety of reformation was not litigated in that case. 537 S.W.3d 924, 926 (Tex. Crim. App. 2017). There, the State relied on an invalid predicate offense for continuous sexual abuse—a New Jersey aggravated sexual assault. *Id*. Failure to prove two Texas predicate offenses rendered the evidence insufficient, but the Court also considered whether Texas had jurisdiction to prosecute. Finding that it did, the Court applied *Thornton* and held that the judgment could be reformed to the other Texas predicate offense that had been proven. *Id*. at 927.

Here, the indictment both stated an offense and vested jurisdiction in the district court. "The proper test to determine if a charging instrument alleges 'an offense' is whether the allegations in it are clear enough that one can identify the offense alleged." *Teal v. State*, 230 S.W.3d 172, 180 (Tex. Crim. App. 2007). The parties and judges at both the trial and court of appeals' level had no trouble identifying the offense in Count 1 as EOCA. 5 RR 8 (trial judge), 13 (trial prosecutor & defense counsel); *Parker*, 2018 WL 1733969, at *2 ("[Appellant] argues, and the State does not dispute, that the State purportedly charged him with, and he was convicted of, violating Section 71.02(a) of the Texas Penal Code."). That count has the distinctive "with intent to establish, maintain, or participate in a combination or

in the profits of a combination" language from § 71.02 as well as the phrase "collaborated in carrying on . . . criminal activity" derived from the definition of combination in § 71.01(a). TEX. PENAL CODE §§ 71.01(a), 71.02(a). Moreover, even if it did not properly allege EOCA, it certainly alleged conspiracy to commit the possession offense, and the district court had jurisdiction over both of these felonies.[22] Thus, the alleged defect in the indictment—failure to name a valid predicate offense—does not prevent the indictment from being an indictment or otherwise giving the district court jurisdiction to enter a judgment.

Conspiracy to commit the drug offense is a lesser-included

In this case, the conspiracy offense is the proper offense for the reformed judgment because it is a lesser included offense of the EOCA allegation. First, it is established by proof of all the "elements" of EOCA except the intent to establish, maintain, or participate in a combination. TEX. CODE CRIM. PROC. art. 37.09(1); *see*

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[22] TEX. HEALTH & SAFETY CODE §§ 481.112(d) (first-degree-felony to possess with intent to deliver between four and 200 grams of a penalty-group-1 substance), 481.108 (Penal Code Title 4, which includes TEX. PENAL CODE § 15.02, Criminal Conspiracy, applies to the Texas Controlled Substances Act, including § 481.112); TEX. PENAL CODE § 15.02(d) (conspiracy is one category lower than object offense).

Garza v. State, 213 S.W.3d 338, 351 (Tex. Crim. App. 2007) (finding only difference between EOCA and predicate offense is commission of predicate as a gang member). The conspiracy offense is necessarily subsumed: a person could not have committed Count 1 as alleged without also committing conspiracy to possess a controlled substance with intent to deliver. CR 5.[23] Thus it also qualifies as a lesser-included offense under Article 37.09(4)'s catch-all provision for offenses that "consist of . . . an otherwise included offense." TEX. CODE CRIM. PROC. art. 37.09(4). Because the State could have abandoned the EOCA-specific language in Count 1 and been left with an allegation of conspiracy to possess a controlled substance with intent to deliver, the court of appeals should have considered the judgment susceptible to reformation to that offense.

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[23] Count 1 alleged: "with the intent to establish, maintain, or participate in a combination or in the profits of a combination, said combination consisting of the defendant and Ladelsha Price and Christopher Crosby, who collaborated in carrying on the hereinafter described criminal activity, conspire to commit the offense of Possession of a Controlled Substance in an Amount of Four Grams or More but Less than 200 grams with Intent to Deliver by agreeing with each other that Christopher Crosby would engage in conduct that constituted said offenses, and the defendant and Ladelsha Price performed an overt act in pursuance of said agreement, to-wit: providing a location for the possession of said controlled substance."

Reformation under* Thornton *and* Bowen *should apply in the plea context

Although *Thornton* and *Bowen v. State*, on which it relies, involved contested trials,[24] an "unjust result" like that in *Bowen* occurs when a defendant's presumed-voluntary[25] guilty plea to a greater offense is reduced to a complete acquittal. By pleading guilty, a defendant like Appellant necessarily admits all the elements of a lesser-included or subsumed offense.[26] Such defendants are "foreclosed by the admissions inherent in their guilty pleas" from raising a factual claim contrary to their plea. *See Class v. United States*, 138 S. Ct. 798, 804 (2018) (quoting *United States v. Broce*, 488 U.S. 563 (1989)). Here, Appellant's judicial confession expressly admitted his guilt to any lesser included offenses. CR 111 ("I am guilty of the offense alleged as well as all lesser offenses."). And Appellant has not alleged that his plea was involuntary. *See* Appellant's Court of Appeals Brief (raising legal

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[24] *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012). Reformation has already been applied to bench trials. *Rabb v. State*, 483 S.W.3d 16, 22 (Tex. Crim. App. 2016).

[25] *Mallet v. State*, 65 S.W.3d 59, 64 (Tex. Crim. App. 2001) (a duly admonished guilty plea is prima facie evidence that a guilty plea was knowing and voluntary).

[26] Absent a showing to the contrary, there is a presumption of the regularity of the judgment of conviction and the proceedings that the defendant must overcome. *Ex parte Wilson*, 716 S.W.2d 953, 956 (Tex. Crim. App. 1986).

sufficiency claims).

Thornton and *Bowen* discuss reformation in terms of not usurping the "fact finder's determination of guilt." *Thornton*, 425 S.W.3d at 298; *Bowen*, 374 S.W.3d at 432. But if reformation is appropriate following a contested trial to preserve the jury or judge's factual determinations unaffected by the error in the greater offense, it would be equally appropriate where the defendant has acknowledged his guilt of the lesser and waived his right to have a judge or jury make such findings. Entering an all-out-acquittal in this situation provides a windfall to a defendant when the lesser is unaffected by the error in the greater offense. A defendant's judicial admission to all elements of the lesser and the State's Article 1.15 evidence of his guilt would ordinarily be enough to enter judgment on the lesser. Further, if the defendant was willing to enter a plea to the greater, he probably would have done so for the lesser, too. At any rate, it can be said of any reformation (not just in the plea context) that the parties might have done things differently had they known of the error at the time. It is far worse to reward defendants who may be lying behind the log or authorize acquittal where the defendant's own conduct in deciding to plead guilty (and thus relieving the State of its burden of proof) removes an option the State otherwise would have had to reform the judgment to a lesser. Given that

judgments arising from a plea of "guilty" and "not guilty" have equal validity,[27] the availability of reformation should likewise be the same.

Moreover, in the open plea context, there is frequently legally sufficient record evidence, as here, to support a conviction for the lesser-included offense, as required in *Thornton*. Conspiracy to commit the possession offense requires proof that Appellant, Crosby, and Price agreed that Crosby would knowingly possess between four and 200 grams of a controlled substance with intent to deliver it and that Appellant or Price performed the overt act of providing a location for the possession or delivery. TEX. PENAL CODE § 15.02(a) & TEX. HEALTH & SAFETY CODE § 481.112(d). The record evidence establishes Appellant's guilt of that offense. According to the informant, Appellant was dealing and in possession of cocaine at the Hoskins Street duplex on January 3. Police discovered Crosby and 80 grams of cocaine there on January 6, and Appellant's possession of the search warrant return the next day shows he had some personal stake in (if not control over) the duplex. Crosby said Appellant and Price provided the duplex and others were

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[27] *See United States v. Williams*, 642 F.2d 136, 139 (5th Cir. [Unit B] 1981). ("Once convicted, whether as a result of a plea of guilty, nolo contendere, or of not guilty (followed by trial), convictions stand on the same footing, unless there be a specific statute creating a difference.")

selling cocaine there for him, and Appellant was captured on video delivering cocaine himself on numerous other occasions. The landlord identified Price as the renter of the Hoskins Street duplex, and Appellant and Price provided locations for other cocaine deals. Consequently, reformation is appropriate under *Thornton*.

Nevertheless, the court of appeals has not had the opportunity to consider whether *Thornton* can be extended to the open-plea context. Remand to the court of appeals would be appropriate to consider that issue.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgments of the court of appeals, and affirm Appellant's conviction for EOCA, or in the alternative, remand for reconsideration of the appropriate remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 5,960 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 16th day of July 2018, the State's Brief was served electronically on the parties below.

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Appendix A

Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922-24

(S.B. 151) (eff. June 10, 1977)

ORGANIZED CRIMINAL ACTIVITY

CHAPTER 346

S. B. No. 151

An Act relating to a definition of "combination" and "conspires to commit" in relation to organized crime and to the offense of engaging in organized criminal activity; creating certain offenses; providing penalties and venue for prosecution; providing testimonial immunity; excluding certain defenses; providing a defense by renunciation; amending the Penal Code to add Title 11, Organized Crime; adding Article 13.21 to the Code of Criminal Procedure, 1965, as amended; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. The Penal Code is amended by adding [30] Title 11 to read as follows:

TITLE 11. ORGANIZED CRIME

CHAPTER 71. ORGANIZED CRIME

"Sec. 71.01. Definitions

"In this chapter, (a) 'combination' means five or more persons who collaborate in carrying on criminal activities, although:

"(1) participants may not know each other's identity;

"(2) membership in the combination may change from time to time; and

"(3) participants may stand in a wholesaler-retailer or other arm's-length relationship in illicit distribution operations.

"(b) 'Conspires to commit' means that a person agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them perform an overt act in pursuance of the agreement. An agreement constituting conspiring to commit may be inferred from the acts of the parties.

"Sec. 71.02. Engaging in Organized Criminal Activity

"(a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following:

"(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, or forgery;

"(2) any felony gambling offense;

"(3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;

"(4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons; or

"(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception.

30. V.T.C.A. Penal Code, §§ 71.01 to 71.05.

"(b) Except as provided in Subsection (c) of this section, an offense under this section is one category higher than the most serious offense listed in Subdivisions (1) through (5) of Subsection (a) of this section that was committed, and if the most serious offense is a Class A misdemeanor, the offense is a felony of the third degree, except that if the most serious offense is a felony of the first degree, the offense is a felony of the first degree.

"(c) Conspiring to commit an offense under this section is of the same degree as the most serious offense listed in Subdivisions (1) through (5) of Subsection (a) of this section that the person conspired to commit.

"Sec. 71.03. Defenses Excluded

"It is no defense to prosecution under Section 71.02 of this code that:

"(1) one or more members of the combination are not criminally responsible for the object offense;

"(2) one or more members of the combination have been acquitted, have not been prosecuted or convicted, have been convicted of a different offense, or are immune from prosecution;

"(3) a person has been charged with, acquitted, or convicted of any offense listed in Subsection (a) of Section 71.02 of this code; or

"(4) once the initial combination of five or more persons is formed there is a change in the number or identity of persons in the combination as long as two or more persons remain in the combination and are involved in a continuing course of conduct constituting an offense under this chapter.

"Sec. 71.04. Testimonial Immunity

"(a) A party to an offense under this chapter may be required to furnish evidence or testify about the offense.

"(b) No evidence or testimony required to be furnished under the provisions of this section nor any information directly or indirectly derived from such evidence or testimony may be used against the witness in any criminal case, except a prosecution for aggravated perjury or contempt.

"Sec. 71.05. Renunciation Defense

"(a) It is an affirmative defense to prosecution under Section 71.02 of this code that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor withdrew from the combination before commission of an offense listed in Subdivisions (1) through (5) of Subsection (a) of Section 71.02 of this code and took further affirmative action that prevented the commission of the offense.

"(b) Renunciation is not voluntary if it is motivated in whole or in part:

"(1) by circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective; or

"(2) by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

"(c) Evidence that the defendant withdrew from the combination before commission of an offense listed in Subdivisions (1) through (5) of Subsection (a) of Section 71.02 of this code and made substantial effort to prevent the commission of an offense listed in Subdivisions (1) through

(5) of Subsection (a) of Section 71.02 of this code shall be admissible as mitigation at the hearing on punishment if he has been found guilty under Section 71.02 of this code, and in the event of a finding of renunciation under this subsection, the punishment shall be one grade lower than that provided under Section 71.02 of this code."

Sec. 2. Chapter 13, Code of Criminal Procedure, 1965, as amended, is amended by adding [31] Article 13.21 to read as follows:

"Art. 13.21. Organized criminal activity

"The offense of engaging in organized criminal activity may be prosecuted in any county in which any act is committed to effect an objective of the combination."

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the senate on May 12, 1977: Yeas 26, Nays 2; May 13, 1977, senate reconsidered the vote by which finally passed; May 13, 1977, again finally passed: Yeas 24, Nays 3; May 24, 1977, senate refused to concur in house amendments and requested appointment of Conference Committee; May 25, 1977, house granted request of the senate; May 27, 1977, senate adopted Conference Report: Yeas 25, Nays 4; passed the house, with amendments, on May 24, 1977: Yeas 128, Nays 4, one present not voting; May 25, 1977, house granted request of the senate for appointment of Conference Committee; May 27, 1977, house adopted Conference Report: Yeas 123, Nays 20, two present not voting.

Approved June 10, 1977.

Effective June 10, 1977.

31. Vernon's Ann.C.C.P. art. 13.21.

Appendix B

Act of 1973, 63rd Leg., R.S., ch. 429, § 4.03, 1973 Tex. Gen. Laws 1132, 1153-54

(H.B. 447) (eff. Aug. 27, 1973)

(excerpt)

cepted if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

(7) Any material, compound, mixture or preparation which contains any quantity of the following substances:

(A) Barbital;
(B) Chloral betaine;
(C) Chloral hydrate;
(D) Ethchlorvynol;
(E) Ethinamate;
(F) Methohexital;
(G) Meprobamate;
(H) Methylphenobarbital;
(I) Paraldehyde;
(J) Petrichloral;
(K) Phenobarbital.

(8) Any compound, mixture, or preparation containing any depressant substance listed in Subsection (d)(7) is excepted if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

(9) Peyote, unless unharvested and growing in its natural state.

(e) Penalty Group 4. Penalty Group 4 shall include any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(2) not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(3) not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(4) not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(5) not more than 15 milligrams of opium per 29.5729 milliliters or per 28.35 grams.

Unlawful manufacture or delivery of controlled substances

Sec. 4.03. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1, 2, 3, or 4.

(b) An offense under Subsection (a) of this section with respect to:

(1) a controlled substance in Penalty Group 1 is a felony of the first degree;

(2) a controlled substance in Penalty Group 2 is a felony of the third degree;

(3) a controlled substance in Penalty Group 3 is a felony of the third degree;

(4) a controlled substance in Penalty Group 4 is a Class A misdemeanor.

(c) The provisions of Section 4.01(c) and (d) do not apply to an offense under this section relating to a controlled substance in Penalty Group 2.

Unlawful possession of a controlled substance

Sec. 4.04. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice.

(b) An offense under Subsection (a) of this section with respect to:

(1) a controlled substance in Penalty Group 1 is a felony of the second degree;

(2) a controlled substance in Penalty Group 2 is a felony of the third degree;

(3) a controlled substance in Penalty Group 3 is a Class A misdemeanor;

(4) a controlled substance in Penalty Group 4 is a Class B misdemeanor.

Possession and delivery of marihuana

Sec. 4.05. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana.

(b) An offense under Subsection (a) of this section is:

(1) a felony of the third degree if he possesses more than four ounces;

(2) a Class A misdemeanor if he possesses four ounces or less but more than two ounces;

(3) a Class B misdemeanor if he possesses two ounces or less.

(c) The possession of marihuana may not be considered a crime involving moral turpitude.

(d) Except as otherwise provided by this Act, a person commits an offense if he knowingly or intentionally delivers marihuana.

(e) Except as provided in Subsection (f) of this section, an offense under Subsection (d) of this section is a felony of the third degree.

(f) An offense under Subsection (d) is a Class B misdemeanor if the actor delivers one-fourth ounce or less without receiving remuneration.

Resentencing

Sec. 4.06. (a) Any person who has been convicted of an offense involving a substance defined as marihuana by this Act prior to the effective date of this Act may petition the court in which he was convicted for resentencing in accordance with the provisions of Section 4.05 of this Act whether he is presently serving a sentence, is on probation or parole, or has been discharged from the sentence.

(b) On receipt of the petition, the court shall notify the appropriate prosecuting official and shall set the matter for a hearing within 90 days.